87-1578

No.

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

JOSEPH SODOWSKI,
Petitioner,

vs.

NATIONAL FLOOD INSURANCE
PROGRAM OF THE FEDERAL
EMERGENCY MANAGEMENT AGENCY,
Respondent.

On Writ Of Certiorari To The
United States Court of Appeals For
The Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

BRUCE THIEMANN
HAFELE, THIEMANN & ASSOCIATES
717 First National Bank Bldg.
Peoria, Illinois 61602
(309)673-0030

Attorney for Petitioner
Joseph Sodowski

THE QUESTION PRESENTED FOR REVIEW

Whether structural damages to a dwelling due to settlement during inundation by flood waters is a "DIRECT LOSS BY 'FLOOD'" under the policy, or is excluded as "earth movement"?

LIST OF PARTIES

A. Joseph Sodowski

B. National Flood Insurance Program of the Federal Emergency Management Agency

TABLE OF AUTHORITIES

Cases:	Pages
5 J. Appleman, Insurance Law and Practice, Section 3083, 309-11 (1970)	13,14
Aschenbrenner v. U.S. Fidelity & Guaranty Co., 292 U.S. 80, 54 S.Ct. 590, 78 L.Ed. 1137, reh'g den. 292 U.S. 615, 54 S.Ct. 861, 78 L.Ed. 1474 (1934)	16
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REPORTS OF OPINIONS

Sodowski v. National Flood Insurance Program of the Federal Emergency Management Agency, 834 F.2d 653 (7th Circuit 1986).

The District Court's unpublished opinion in *Sodowski v. National Flood Insurance Program of the Federal Emergency Management Act*, Case No. 84-1350, Central District Of Illinois was filed July 11, 1986.

JURISDICTIONAL STATEMENT

(i) The United States Circuit Court of Appeals for the Seventh Circuit entered its order following appeal on November 25, 1987.

(ii) 28 U.S.C. §2101(c).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Title 28 U.S.C. §2101

STATEMENT OF THE CASE

In December of 1982 the Illinois River overflowed its banks with flood waters reaching one of the highest levels in recent times. The home of Joseph Sodowski on the west bank of the Illinois River was inundated with water filling the basement, crawl space, and reaching the first floor living area. Substantial structural damage was sustained.

At the time Sodowski was insured under a Standard Flood Insurance Policy

(SFI Policy) issued pursuant to the National Flood Insurance Program (NFIP) administered by the Federal Emergency Management Agency (FEMA).

Sodowski's SFI Policy insured his property against all "DIRECT LOSS BY FLOOD". The policy defines "flood:"

> "Wherever in this policy the term 'flood' occurs, it shall be held to mean:
>
> A. A general and temporary condition of partial or complete inundation of normally dry land areas from:
>
> 1. The overflow of inland or tidal waters.
>
> 2. The unusual and rapid accumulation or runoff of surface waters from any source.
>
> 3. Mudslide (i.e., mudflow), a river or flow of liquid mud proximately caused by flooding as defined in subparagraph A-2 above or by the accumulation of water under the ground.

but fell within the "earth movement" exclusion. The Court granted Sodowski a judgment of $3,000.00 representing the value of a wooden wall surrounding the crawl space and basement, which the Court found was destroyed through current and wave activity covered by the policy.

Sodowski appealed the District Court's Order which denied his claim of structural damages in the amount of $50,060.64. The Seventh Circuit Court of Appeals on November 25, 1987, affirmed the District Court and agreed with the District Court that "'[t]he settlement [of the soil or ground] which caused the damage to the house is a type of earth movement which is excluded from the coverage of the insurance policy' because it is neither a mudslide nor erosion." (Appendix A-6)

ARGUMENT

A Federal Court of Appeals has rendered a decision in conflict with the decision of another Federal Court of Appeals on this same matter.

On February 22, 1985 the United States Court of Appeals for the Eleventh Circuit held that a Standard Flood Insurance Policy (SFI Policy) covered damages caused by settling due to compaction of soil occurring during flooding. *Quesada v. Director, Federal Emergency Agency*, 753 F.2d 1011 (11th Cir., 1985). In *Quesada*, a tropical storm caused exceptionally heavy rainfall resulting in flooding in the area of the Quesada's home. While no water actually entered the interior of the Quesada's home, the home sustained structural damage due to the total

saturation of the fill beneath the home resulting in compaction of the fill and settling. The Quesadas had a standard SFI Policy with FEMA which had the same language defining "flood" and excluding damage by "earth movement" as Sodowski's SFI Policy in the case at bar.

In *Quesada*, the government argued that the definition of "flood" in the policy did not cover the factual situation and that the "earth movement" exclusion applied. The District Court concluded the policy's definition of "flood" did cover the facts presented and the exclusion was not applicable.

The government's argument in *Quesada* that flood waters must actually inundate a home in order for there to be coverage was not made in the case at bar since all the parties agreed that flood waters did enter Sodowski's home, fill

the crawl space and basement reaching the first floor living area.

The government's second contention, in *Quesada*, was that the "earth movement" exclusion applied. The *Quesada* majority found the argument unpersuasive and reasoned as follows:

> "The government's contention that the 'earth movement' exclusion precludes recovery is really grounded on a very strained proximate cause theory, to wit, the nearest and most immediate 'cause' of the damage was the compaction of the soil beneath appellees' home. Though in the most literal sense this may be true, we can not ignore the uncontradicted fact that the compaction would not have occurred but for the flooding and did in fact occur simultaneously therewith. If we deny coverage in this factual situation, we are hard pressed to imagine a scenario, other than the actual washing away of a house, where coverage would exist." *Id.* at 1014.

In *Quesada*, the government relied on the reasoning and authority of *West v. Harris*, 573 F.2d 873 (5th Cir., 1978)

cert. den. 440 U.S. 946, 99 S.Ct. 1424, 59 L.Ed.2d 635 (1979). In *West*, houses were built on reclaimed swamp land which settled when municipal authorities became alarmed at water accumulation in canals nearby and determined to drain the canals as rapidly as possible. The rapid draining of the canals lowered the water table quickly with a result that the soil dried and the houses settled unevenly causing structural damage. The Fifth Circuit Appellate Court held the damage excluded by the "earth movement" exclusion because it was established without contradiction that the immediate cause of the damage was the settlement of the house due to the uneven soil support.

The majority opinion in *Quesada* distinguished *West*, because of evidence in *West* showing that the damage to the

houses would probably have occurred regardless of any flood due to the fact that the houses were built on reclaimed swamp land which expands and contracts even with normal changes in soil moisture.

The Seventh Circuit Court of Appeal's majority opinion in the case at bar adopted the Fifth Circuit's holding in *West* and rejected the decision of the Eleventh Circuit in *Quesada*, charging the *Quesada* majority with expanding the terms of the SFI Policy through an act of judicial activism. The Seventh Circuit majority made its ruling despite the fact that the case at bar is extremely similar factually to *Quesada* and very dissimilar factually to *West*.

The Honorable Robert A. Grant, Senior District Judge for the Northern District of Indiana, sitting by

designation with the Seventh Circuit, authored a well reasoned dissenting opinion which distinguished *West* and followed a similar proximate cause analysis as found in *Quesada*. Judge Grant reasoned:

> "...In Mr. Sodowski's circumstances, the flood was the *sine qua non* of his total losses; damage to the structure of his home cannot be separated from the immediate damage that occurred from the flood waters. I am convinced that the insurance policy can be construed reasonably and correctly to cover Mr. Sodowski's losses." (Appendix A-15)

Judge Grant goes on to note that the circumstances in the case at bar are more similar to the circumstances in *Quesada* than in *West*:

> "In *West*, the holding with which this Court aligns itself, the two damaged houses were built on unstable ground, swampland. furthermore, the city's rapid draining of the canals next to the appellants' homes exacerbated the damage to the structures. No such

> intervening cause was found in the facts of *Quesada*. ..." (Appendix A-16)

It is an accepted principle that federal law controls disputes over SFI Policies issued pursuant to the National Flood Insurance Program and that Federal Courts will apply standard insurance law principles in construing such policies. *Atlas Pallet, Inc. v. Gallagher*, 725 F.2d 131 (1st Cir., 1984).

It is further clear that standard insurance law principles view the proximate cause of a loss to be the efficient cause, the one which sets the others in motion, though other causes may follow it and operate more immediately to produce the loss. 5 *J. Appleman, Insurance Law and Practice*, Section 3083, 309-11 (1970).

Moreover, standard insurance law principles hold that coverage is not

precluded when the nearest or most immediate cause of an occurrence falls within an exclusion, if the insured risk itself sets into operation the chain of causation. 5 *J. Appleman, Insurance Law and Practice*, Section 3083, 309-11 (1970); *Sabella v. Wisler*, 59 Cal.2d 21, 27 Cal.Rptr. 689, 377 P.2d 889 (1963). See also *Fireman's Fund Ins. Co. of San Francisco v. Hanley*, 252 F.2d 780, 785 (6th Cir., 1958), which held that if damage to property resulted from a combination of causes within coverage of policy and causes excluded from coverage of policy, the insureds were entitled to recover.

The primary and most crucial issue in the case at bar is determining the proximate cause of Sodowski's loss. If the proximate cause was "earth movement", then the exclusion would apply.

If however the proximate cause is not "earth movement", but was the flood itself, then the exclusion could not apply.

The reasoning of the Seventh Circuit majority leap frogs over this primary and crucial issue and merely accepts that the immediate cause of the loss, "earth movement" was the proximate cause. In so reasoning, the Seventh Circuit fails to apply any proximate cause analysis whatsoever.

The Seventh Circuit has failed to follow standard insurance law principles because it has equated the proximate cause of the occurrence with the immediate cause. The immediate cause of Sodowski's structural damage was settlement of the soil beneath the residence during inundation by flood waters. The proximate cause, however,

was the flood which resulted in the change in soil consistency and thereby the settlement of the residence. In every real sense the flood caused Sodowski's structural damage. That damage occurred during the flood and by operation of the flood waters.

The United States Supreme Court has held that insurance contracts are to be construed liberally in the insureds interest, in favor of coverage, and strictly against the insurer. *Aschenbrenner v. U.S. Fidelity & Guaranty Co.*, 292 U.S. 80, 54 S.Ct. 590, 78 L.Ed. 1137, reh'g den. 292 U.S. 615, 54 S.Ct. 861, 78 L.Ed. 1474 (1934). The Seventh Circuit majority opinion in the case at bar fails to follow the Supreme Court's authority by its strict construction of Sodowski's flood insurance policy, which results in its holding

that a standard flood insurance policy affords no coverage for structural damages occurring during a flood by operation of the flood waters on the earth beneath Sodowski's residence.

CONCLUSION

The Seventh Circuit Court of Appeals in the case at bar has rendered a decision in conflict with the decision of the Eleventh Circuit Court of Appeals on a similar matter. In so doing, the Seventh Circuit Court of Appeals has ignored standard insurance priciples and construed an insurance policy narrowly and strictly against the insured's interest, against coverage, and in favor of the insurer. Joseph Sodowski therefore prays the Honorable Supreme Court

of the United States to grant certiorari and to examine these questions.

Respectfully submitted,

BRUCE THIEMANN
HAFELE, THIEMANN & ASSOCIATES
717 First National Bank Bldg.
Peoria, Illinois 61602
(309) 673-0030

Attorney for Petitioner
Joseph Sodowski

APPENDIX A

In the
United States Court of Appeals
For the Seventh Circuit

No. 86-2227

JOSEPH SODOWSKI,

Plaintiff-Appellant,

v.

NATIONAL FLOOD INSURANCE PROGRAM OF THE FEDERAL EMERGENCY MANAGEMENT AGENCY,

Defendant-Appellee.

Appeal from the United States District Court
for the Central District of Illinois, Peoria Division.
No. 84-1350—**Hon. Michael M. Mihm**, *Judge.*

ARGUED JANUARY 13, 1987—DECIDED NOVEMBER 25, 1987

Before POSNER and COFFEY, *Circuit Judges*, and GRANT, *Senior District Judge.**

COFFEY, *Circuit Judge.* Joseph Sodowski, plaintiff-appellant, appeals from the district court's order denying recovery for the structural damages his dwelling sustained during a flood in December of 1982. Sodowski based his claim for recovery on the Standard Flood Insurance Policy (SFI Policy) issued pursuant to the National Flood Insurance Program (NFIP) administered by the Federal Emer-

* The Honorable Robert A. Grant, Senior District Judge for the Northern District of Indiana, is sitting by designation.

APPENDIX

gency Management Agency (FEMA). The district court denied coverage finding that the dwelling's structural damage was caused by soil settlement and thus excluded under the SFI Policy's earth movement exclusion. We affirm.

I

The facts material to this case are undisputed. Sodowski owns a home on the west bank of the Illinois River, in Peoria County, Illinois. He purchased the dwelling in the early 1950's. During the late 1960's, Sodowski built an addition to his house (away from the river). The older portion of the house contained a master bedroom, bathroom, living room, kitchen, a basement, and a crawlspace.

In December, 1982, when the Illinois River overflowed its banks, the water inundated Sodowski's basement, crawlspace, and reached the first floor living area.[1] The house sustained substantial structural damage and current and/or wave activity collapsed a wooden wall surrounding the crawlspace and basement. At the time of the December 1982 flood, Sodowski was insured under a SFI Policy issued by the NFIP pursuant to the National Flood Insurance Act of 1968, 42 U.S.C. § 4001 *et seq.*, and administered by the FEMA.

Sodowski's SFI Policy insured his property against all "Direct Loss By 'Flood.'" The policy defines "flood:"

> "Wherever in this policy the term 'flood' occurs, it shall be held to mean:
>
> A. A general and temporary condition of partial or complete inundation of normally dry land areas from:

[1] Sodowski's dwelling also was inundated by water during floods in 1962, 1970, 1973, 1974, 1976, and 1979. The evidence established that the water level during the 1982 flood reached one of its highest levels in recent times.

1. The overflow of inland or tidal waters.

2. The unusual and rapid accumulation or runoff of surface waters from any source.

3. Mudslide (i.e., mudflow), a river or flow of liquid mud proximately caused by flooding as defined in subparagraph A-2 above or by the accumulation of water under the ground.

B. The collapse or subsidence of land along the shore of a lake or other body of water as a result of erosion or undermining caused by waves or currents of water exceeding the anticipated cyclical levels."

The policy also provides that: "The Insurer shall not be liable for loss: by . . . earthquake, landslide or any other earth movement except such mudslide or erosion as is covered under the peril of flood."

After the flood, Sodowski filed two proof of loss claims with the NFIP claiming: (1) structural damage to the dwelling in the amount of $50,000; and (2) damage to the contents of his home in the amount of $2,066.15. FEMA paid Sodowski's claim for the damaged contents, but denied coverage for the structural damage asserting that these damages were excluded under the earth movement exclusion of the policy. Sodowski filed suit against FEMA and after a trial to the court the trial judge entered judgment in favor of Sodowski in the amount of $3,000 for the value of the wooden wall, but found that the structural damage to Sodowski's dwelling was caused by "settlement of the ground beneath the house" and was thus excluded under the terms of the SFI Policy.

Appellant raises two issues on appeal: (1) whether the SFI Policy provides coverage for structural damage to a dwelling caused by soil settlement which was itself caused by flooding, and (2) whether he is entitled to prejudgment interest on his damages.

II

The relevant facts are undisputed; thus, the issue before us is whether the trial court properly interpreted the SFI Policy to exclude coverage for structural damages directly caused by soil settlement, itself a result of the flood. This question is one of first impression in this circuit, and we join the Fifth Circuit's holding in *West v. Harris*, 573 F.2d 873 (5th Cir. 1978), *cert. denied*, 440 U.S. 946 (1979), that the SFI Policy does not provide coverage for damages caused by any earth movements other than those expressed exceptions set forth in the earth movement exclusion.

We note initially that the district court found that the structural damage to Sodowski's house was caused "by settlement of the ground beneath the house, caused by a change in the consistency of the soil when the flood waters surrounded the foundation during the December 1982 flood." The appellant concedes "that earth movement was the nearest or immediate cause" of his loss but asserts that because the flood waters caused the change in the soil's consistency, the flooding must be a proximate cause of the structural damage. Sodowski contends that the SFI Policy is ambiguous because under one construction of the policy language, damages resulting from soil settlement, itself caused by flooding, are not covered pursuant to the earth movement exclusion, but under another, more "reasonable construction" of the policy language, these same damages would be covered as a direct loss by flood. Sodowski argues that because the insurance policy is ambiguous, we should construe the language strictly against the insurer and liberally in the insured's interest; therefore, appellant asserts that the SFI Policy covers the structural damages to his dwelling caused by earth movement, itself caused by an inundation of flood water.

Federal common law controls the interpretation of insurance policies issued pursuant to the National Flood Insurance Program (NFIP). *Hanover Building Materials v. Guiffrida*, 748 F.2d 1011, 1013 (5th Cir. 1984); *Atlas*

Pallet, Inc. v. Gallagher, 725 F.2d 131, 135 (1st Cir. 1984); *West v. Harris*, 573 F.2d 873, 881 (5th Cir. 1978), *cert. denied*, 440 U.S. 946 (1979); *accord Meister Bros. Inc. v. Macy*, 674 F.2d 1174, 1175 fn. 2 (7th Cir. 1982). Courts applying federal common law to flood insurance policies have recognized that "Congress did not intend to abrogate standard insurance law principles" by enacting the NFIP. *Atlas Pallet, Inc.*, 725 F.2d at 135; *Drewett v. Aetna Casualty & Surety Co.*, 539 F.2d 496 (5th Cir. 1976). Because "neither the statutory nor decisional law of any particular state is applicable to the case at bar, we are [thus] free to apply the 'traditional common law technique of decision by drawing upon standard insurance principals.' " *Atlas Pallet Inc.*, 725 F.2d at 135 (quoting *West v. Harris*, 573 F.2d at 881); *see also Brazil v. Guiffrida*, 763 F.2d 1072, 1075 (9th Cir. 1985). Because the interpretation given to an insurance policy is a question of law, our review is *de novo*. *Atlas Pallet, Inc.*, 725 F.2d at 134.

Appellant directs our attention to *Aschenbrenner v. United States Fidelity & Guaranty Co.*, 292 U.S. 80 (1934), for the insurance principles controlling the present dispute. That Court stated:

> "[W]e are interpreting a contract and are concerned only with the sense in which its words were used. . . . The phraseology of contracts of insurance is that chosen by the insurer and the contract in fixed form is tendered to the prospective policy holder who is often without technical training, and who rarely accepts it with a lawyer at his elbow. So if its language is reasonably open to two constructions, that more favorable to the insured will be adopted, . . . and unless it is obvious that the words are intended to be used in their technical connotation they will be given the meaning that common speech imports."

Aschenbrenner, 292 U.S. at 84-85 (citations omitted). However, " 'if the language of a policy is clear and unambiguous, it should be accorded its natural meaning.' " *Hanover Building Materials, Inc. v. Guiffrida*, 748 F.2d at 1013 (quoting *Landress Auto Wrecking Co. Inc. v. United States*

Fidelity & Guaranty Co., 696 F.2d 1290, 1292 (5th Cir. 1983)). Applying these principles, we initially determine whether the language found in the flood insurance policy is "reasonably open to two constructions."

Sodowski's flood insurance policy provides that the defendant "shall not be liable for loss: by . . . earthquake, landslide *or any other earth movement except* such mudslide or erosion as is covered under the peril of flood." (Emphasis added.) In unambiguous terms, the policy excludes from coverage losses caused by any earth movement except mudslides or erosion.[2] The language in the SFI Policy does not expressly except losses caused by soil settlement resulting from flooding from the earth movement exclusion. The language is unambiguous in its recitation that only losses caused by mudslides or erosion are covered. Sodowski acknowledges that the structural damage to his dwelling was caused by ground settlement but nonetheless argues for coverage because the settlement of the soil was caused by the flood. We sympathize with the claimant, but Mr. Sodowski is in error, for a reading of the policy allows only one reasonable construction, namely, that the policy clearly excludes damages resulting from any earth movement other than those caused by a mudslide or erosion. We agree with the district court that "[t]he settlement [of the soil or ground] which caused the damage to the house is a type of earth movement which is excluded from the coverage of the insurance policy" because it is neither a mudslide nor erosion.[3] Therefore, we

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[2] During trial the plaintiff unsuccessfully attempted to prove that the structural damage was caused by erosion as defined in the SFI Policy under "direct loss by flood" but failed to convince the court, the trier of fact in this instance. The appellant has conceded that the structural damage was not a result of erosion.

[3] "Earth movement" is defined as the "elevation or subsidence of the land," *Dictionary of Geological Terms*, Revised Edition (1976); *Webster's Third New International Dictionary*, Unabridged (1981), "land" is defined as the "ground or soil in respect to its

(Footnote continued on following page)

hold that Sodowski is not entitled to recover for the structural damage caused by soil settlement regardless of the cause of the soil settlement itself.

Thus, we join the Fifth Circuit's holding in *West v. Harris*, 573 F.2d 873 (5th Cir. 1978) *cert. denied*, 440 U.S. 946 (1979), and reject the decision of the Eleventh Circuit in *Quesada v. Director, Federal Emergency Management Agency*, 753 F.2d 1011 (11th Cir. 1985). In West, the court was faced with two similar factual situations, both involving houses built on concrete slabs. There, as in this case, flooding occurred in the area surrounding the two dwellings, and in one instance water also inundated the house. The soil under the insureds' structures became saturated with water and eventually the soil settled causing structural damage to the dwelling. The court stated that "[r]egardless of whether this settlement had been in process over a long period of time or whether it occurred immediately after the flood and draining of the canals, it was still the result of earth movement." *West v. Harris*, 573 F.2d at 877. The court, giving full effect to the earth movement exclusion and disallowing the plaintiffs' claims, held that "[t]he policy does not cover loss caused by earth movement in the form of soil settlement."[4] *Id.*

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[3] *continued*
situation, nature, or quality," *Webster's* (1981), and "subsidence" is characterized as the act or process of subsiding or settling. *Id.* The district court's undisputed finding is that "[t]he cause of the structural damage to the Plaintiff's house was settlement of the ground beneath the house, caused by a change in the consistency of the soil when the flood waters surrounded the foundation during the December, 1982 flood." The ground settlement in this case is clearly a type of land subsidence or earth movement.

[4] The dissent asserts that:

> " 'The heart' of *West*, according to the *Quesada* district court, was that the flood insurance policy did not cover 'damage which was "the result of earth movement," where such movement would have occurred over time *regardless* of the flooding . . . .' "

(Footnote continued on following page)

In *Quesada*, the case Sodowski relies on, the plaintiff's Florida home was constructed on a concrete slab resting on sand fill. During a tropical storm, the underground water rose to within inches of the concrete slab while at the same time saturating the sand beneath the house. After the storm the water receded, the saturated sand settled causing movement of the foundation resulting in structural damage to the house. Over a compelling dissent, the majority, rejecting the *West* rationale, held that the SFI Policy provided coverage under the circumstances because the soil compaction would not have been triggered "but for" the flooding. *Quesada*, 753 F.2d at 1014.

In so holding, the majority noted that the policy at issue in *Quesada* covered losses resulting from erosion caused by flooding, unlike the policy at issue in *West*. The court implied that the broadening of coverage by the erosion "addition" justified rejecting the holding in *West*. We are of the belief that the *Quesada* court misconstrued the impact of the erosion "addition" to the insurance policy. The amended policy at issue in *Quesada*, like the policy in effect at the time of the unfortunate 1982 flood, clearly excludes damages resulting from earth movement except those caused by mudslides and erosion. The Federal Emergency Management Agency's (FEMA) S.F.I. Policy provides additional coverage for erosion caused by flooding, nothing more, nothing less.

Furthermore, our research reveals, contrary to the dissenter's belief, that neither Congress nor the Federal

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[4] *continued*

The dissent ignores the clear holding of West that "regardless" of when the settlement occurred, as long as the soil settlement caused the property damage, coverage is denied under the earth movement exclusion. *West v. Harris*, 573 F.2d at 877. As Judge Tjoflat observed in his dissent: "There was no finding in *West* that the damage was caused by some preexisting condition in the supporting soil; to the contrary, the finding was that the saturation of the supporting soil, followed by the lowering of the water level, caused the damage." *Quesada*, 753 F.2d at 1016.

Emergency Management Agency (FEMA) have even suggested, much less directed, that the SFI Policy provides coverage for losses caused by earth movement, itself caused by flooding. The National Flood Insurance Program, unlike private insurance plans, was established by Congress with the enactment of the National Flood Insurance Act of 1968, 42 U.S.C. § 4001, *et. seq.* Initially, the National Flood Insurers Association (NFIA), an unincorporated association of insurance companies, managed the Program with the United States Department of Housing and Urban Development (HUD) in a "cooperative government-industry joint venture." *National Flood Insurers Ass'n v. Harris*, 444 F. Supp. 969, 970 (D.D.C. 1977). In 1976 the Secretary of HUD and the NFIA "began to suffer disagreements concerning the administration of the [Program, and in particular disagreed over] the general authority of the Secretary . . . to construe the terms of the Standard Flood Insurance Policy." *Id.* at 970-71. The result of the disagreements between HUD and the NFIA was that the Secretary took control and assumed all operational responsibilities of the Program on January 1, 1978. *Id.* at 970. On March 31, 1979, the Director of the Federal Emergency Management Agency (FEMA) took over HUD's duties and responsibilities under the Program. *Possessky v. National Flood Insurer's Ass'n*, 507 F. Supp. 913, 914 (D.S.D. 1981); *see also In re Estate of Lee v. National Flood Insurance Program*, 812 F.2d 253, 256 (5th Cir. 1987). Under the Act, the Director of FEMA (after consultation with various advisory committees pursuant to the provisions of the Act) is to "provide by regulation for general terms and conditions of insurability . . . including . . . the nature and limits of loss or damage . . . which may be covered by [flood] insurance, [as well as] . . . the classification, limitation and rejection of any risks which may be advisable." 42 U.S.C. § 4013 (a)(2)&(3).

Accordingly, the Director has defined "flood" or "flooding" under the policy to include the following four categories of occurrences:

"(a) A general and temporary condition of partial or complete inundation of normally dry land areas from:

(1) The overflow of inland or tidal waters.

(2) The unusual and rapid accumulation or runoff of surface waters from any source.

(3) Mudslides (i.e., mudflows) which are proximately caused or precipitated by accumulations of water on or under the ground.

(b) The collapse or subsidence of land along the shore of a lake or other body of water as a result of erosion or undermining caused by waves or currents of water exceeding anticipated cyclical levels or suddenly caused by an unusually high water level in a natural body of water, accompanied by a severe storm, or by an unanticipated force of nature, such as flash flood or an abnormal tidal surge, or by some similarly unusual and unforseeable event which results in flooding as defined in (a)(1) of this section."

44 C.F.R. § 59.1 (1982). Appellant's SFI Policy, as noted above, contains an almost identical definition of flood. Furthermore, the regulations also provide that:

" '*Mudslide*' (i.e., mudflow) describes a condition where there is a river, flow or inundation of liquid mud down a hillslide usually as a result of a dual condition of loss of brush cover, and the subsequent accumulation of water on or under the ground preceded by a period of unusually heavy or sustained rain. A mudslide (i.e., mudflow) may occur as a distinct phenomenon while a landslide is in progress, and will be recognized as such by the Administrator only if the mudflow, and not the landslide, is the proximate cause of damage that occurs."

We note that of the four categories of occurrences enumerated in the Director's list as qualifying for insurable flood damage as earth movements, only those losses resulting from erosion or mudslide are covered. We hold

that nothing in the language of the regulations referred to above, nor in the Congressional history of this Act, nor in any applicable statute even suggest that a soil settlement condition resulting from flooding was to be an exception to the clearly defined earth movement exclusions of the SFI Policy.

Nevertheless, the dissent argues that Congress intended to provide coverage where the flood or "mudflow and not the landslide is the proximate cause, or *sine qua non*, without which the damage claimed would not have occurred," (quoting S. Rep. No. 583, 93rd Cong. 1st Sess., reprinted in 1973 U.S. Code Cong. & Ad. News 3217, 3229), and thus concludes that the plaintiff-appellant's structural damages should be covered under the Standard Flood Insurance Policy.

The Flood Disaster Protection Act of 1973, *inter alia*, revised the 1968 Act so as to (1) extend coverage to losses caused by erosion as defined in the SFI Policy, S. Rep. No. 583, 93rd Cong. 1st Sess., reprinted in 1973 U.S. Code Cong. & Ad. News 3217, 3229; and (2) amend the mudslide definition of the Act "making clear that losses or damage resulting from mudflows will be paid, regardless of whether there may already have been a landslide in progress." *Id.* at 3228. In this context of amending the "mudslide definition," the Senate report states that the FIA "is expected to pay for mudflow losses that occur unexpectedly while a landslide is in progress, so long as the mudflow and not the landslide is the proximate cause, or *sine qua non*, without which the damage claimed would not have occurred." *Id.* at 3229. Even though Sodowski concedes that erosion did not cause his losses and did not even attempt to prove that his losses were caused by a mudslide (i.e., mudflow), the dissent, for some reason, attempts to rely on the Senate report discussing the new mudslide definition in an attempt to require FEMA to pay for Sodowski's losses because the flood or "mudflow and not the landslide [was] the proximate cause, or *sine qua non*," of Sodowski's losses. Regrettably, the dissent misapplies Congress' definition of a mudslide and confuses the use of the proximate cause analysis.

In this case, had the insured submitted evidence that the losses were in fact caused by a mudslide, it might be appropriate to use a proximate cause analysis to determine whether the particular damages were caused by a mudslide. But in the case before us, the insured failed to submit such evidence. In the absence of evidence of a mudslide, the dissent's attempt to utilize a proximate cause analysis to provide coverage is simply an "end run around" the clear and unambiguous intent and terms of the SFI Policy which excludes coverage for losses caused by any earth movement other than erosion or mudslide. Until Congress or the Federal Emergency Management Agency expressly provides coverage for losses caused by earth movement (soil settlement), itself the result of flooding, we refuse to direct the payment of damages for such alleged losses because "[c]ourts have a duty to carefully observe the express conditions defined by Congress before allowing such awards." *In re Estate of Lee*, 812 F.2d at 256.

Unfortunately, the dissent would join the *Quesada* majority which expanded the terms of the SFI Policy through an act of judicial activism. We refuse to accept this broad and expansive interpretation of the policy and join the Fifth Circuit in holding that the S.F.I. Policy language is clear and unambiguous and excludes all losses caused by any earth movement except those changes in the topography caused by mudslides and erosion.

The Standard Flood Insurance Policy recites in clear and unambiguous terms that the insurer will only be liable for damages caused by two types of earth movements: erosion and mudslides. All losses resulting from any other earth movement are not covered under the SFI Policy. The undisputed facts establish that Sodowski's losses were neither caused by erosion nor mudslide; rather, the structural damage to Sodowski's home was caused by the settlement of the ground beneath his house, a type of earth movement quite distinct from erosion or mudslides. Until Congress authorizes coverage for losses caused by ground settlement, as it has established for losses resulting from

mudslides or erosion, we will not interpret the SFI Policy to the contrary. Thus, we hold that structural damages similar to Sodowski's caused by any earth movement, other than mudslides or erosion, are not covered under the clear and unambiguous terms of the SFI Policy.

III

Sodowski's complaint demanded prejudgment interest on the amount awarded as damages for his losses caused by flooding. Subsequently, Sodowski was awarded $3,000 for the collapse of the wooden wall resulting from the flood. The $3,000 damages had been stipulated to by the parties after the trial and before judgment had been entered. Sodowski concedes that he has waived his claim for prejudgment interest on the $3,000 as a result of the stipulation. Because we hold that he is not entitled to relief on his claim for his structural damages, we need not consider his claim for prejudgment interest on the structural damages.

We affirm.

GRANT, *Senior District Judge, dissenting*: I respectfully disagree with the majority's conclusion that there can be only one reasonable construction of the language of the flood insurance policy at issue.

The evidence showed that this flood of December 1982 was one of the highest in recent times, that the water level remained high for an extended period of time, and that there was current and wave activity against the house. The water inundated the basement and rose into the living area, damaging personal property. The current or waves knocked down a wooden wall. After the water subsided, the walls of the house cracked and separated from the floor; the doors and windows became unaligned, the floors uneven, the roofline crooked. Yet the insurers assumed liability for only the damage to the contents of

the house and the wooden wall. They contended that the structural damage was caused, not by the flood, but by settlement of the structure's footing.

The majority states that it agrees with the district court that the "settlement which caused the damage to the house is a type of earth movement which is excluded from the coverage of the insurance policy" because it is not a mudslide or erosion. It is this narrow reading of the "earth movement" exception with which I disagree.

The "earth movement" exclusion of the policy states that the policy will not cover peril "by theft or by fire, windstorm, explosion, earthquake, landslide or any other earth movement except such mudslide or erosion as is covered under the peril of flood." The term "soil settlement" is not used either in the insurance policy itself or in the federal flood insurance legislation. The question is: If "settlement" is a type of earth movement, as the district court and majority hold, is it more like those perils that are excluded under the policy, or more like "such mudslide or erosion as is covered under the peril of flood"? Keeping in mind that "any ambiguities in an insurance policy should be resolved against the insurance company," *Myers v. Merrimack Mutual Fire Ins. Co.*, 788 F.2d 468, 470 (7th Cir. 1986), we turn for guidance to Congressional explanations of its intent in defining "flood," "erosion," and "mudslide."

The legislative history of the Flood Disaster Protection Act of 1973, P.L. 93-234, which revised the 1968 Act by expanding the national flood insurance program, elucidates in "Definition of 'Flood' " and "Extension of Flood Insurance Program to Cover Losses from Erosion" the extent of coverage provided for damage by flood, mudslide, or erosion. S. Rep. No. 583, 93rd Cong. 1st Sess., reprinted in 1973 U.S. Code Cong. & Ad. News 3217, 3228-29. It makes clear that Congress did not intend to provide coverage for damage due to gradual earth movement, the shifting of unsubstantial fill under buildings, or the normal, continuous and gradual wearing away of land by waves. However, it did intend that the effects of unforeseeable

and sudden floods, mudflows and abnormal erosion situations be covered. Furthermore, where the mudslide or flood is "preceded or accompanied by a slow or gradual movement of the earth, sometimes caused or aggravated by the improper use of fill in the construction of new subdivisions, which had already endangered the insured property, and would ultimately result in its destruction," the FIA would be required to pay for those losses if the mudflow or flood *proximately* caused the damage. Congress explained the amendment clearly:

> The amendment added by the committee is intended to make clear that, just as FIA would be required to pay a sudden flood loss that occurred to an insured property while a gradual landslide was in progress, so too it is expected to pay for mudflow losses that occur unexpectedly while a landslide is in progress, so long as the mudflow and not the landslide is the proximate cause, or *sine qua non*, without which the damage claimed would not have occurred.

Id. at 3229. The evidence in this case clearly showed that the structural damage to appellant's home would not have occurred without the flood.

After considering the legislative history of the definition of "flood," I can only conclude that there is not just one reasonable construction of the instant insurance policy. The policy excludes "any other earth movement except *such* mudslide or erosion *as is covered* under the peril of flood." Congress intended coverage for the *effects* of unforeseeable and sudden floods, mudflows, and erosions, including gradual earth movements that preceded or accompanied those occurrences, as long as the peril was the proximate cause "without which the damage claimed would not have occurred." In Mr. Sodowski's circumstances, the flood was the *sine qua non* of his total losses; damage to the structure of his home cannot be separated from the immediate damage that occurred from the flood waters. I am convinced that the insurance policy can be construed reasonably and correctly to cover Mr. Sodowski's losses.

I further dissent from the majority's decision to join the holding in *West v. Harris*, 573 F.2d 873 (5th Cir. 1978), *cert. denied*, 440 U.S. 946 (1979) rather than *Quesada v. Director, Federal Emergency Management Agency*, 753 F.2d 1011 (11th Cir. 1985). The circumstances of the case before us are more similar to those in *Quesada*, which involved damage to a house built on a sand base. The ground was saturated during a storm; after the storm, as the water receded, the saturated sand compacted and settled. The foundation, no longer supported, sank down to the lowered level, and as a result the floors and walls of the house cracked.

In *West*, the holding with which this court aligns itself, the two damaged houses were built on unstable ground, swampland. Furthermore, the city's rapid draining of the canals next to appellants' homes exacerbated the damage to the structures. No such intervening cause was found in the facts of *Quesada*. The district court opinion, *Quesada v. Director, Federal Emergency Mgmt. Agency*, 577 F. Supp. 695 (S.D. Fla. 1983) fully distinguished the "materially different set of circumstances" found in *West* from the situation of the Quesadas.

> In the case at bar, unlike those of the Wests and the Daigles, the Plaintiffs' home was built not on reclaimed swampland, but over sand—the customary fill used in housing foundations in Dade County. There was no evidence adduced that sand expands and contracts the way the reclaimed swampland, filled in with a mixture of humus and clay, did in the *West* cases. Similarly, no evidence was introduced in support of the notion that sand would cause the kind of "heaving and settling" with moisture changes that occurred in *West*. The Quesadas had never found it necessary to purchase fill for the types of "potholes" found on the land of the Daigles and Wests. Additionally, there was no immediate drainage, and no immediate drying of the land surrounding the Quesadas' residence, as occurred when the drainage canals in *West* were quickly emptied. Finally, although the

> water never entered the Quesadas' house directly, there was evidence adduced at trial that water had come all the way up to the house and under it into its foundation.

577 F. Supp. at 700.

"The heart" of *West*, according to the *Quesada* district court, was that the flood insurance policy did not cover "damage which was 'the result of earth movement,' where such movement would have occurred over time *regardless* of the flooding, or where the movement was in some sense uniquely attributable to the particular structure of the insured's house as compared with others in the locality." *Id.* at 701. On the evidence in *Quesada*, the court found that "it would be unreasonable . . . to find that anything other than the flood caused the damage to plaintiffs' house." *Id.* Therefore, the district court refused to be bound by the Fifth Circuit decision with its "materially distinguishable circumstances" that made it inapposite in *Quesada* and that, in our opinion, distinguish it from the case before us. In accord, the Eleventh Circuit reasonably concluded that the compacting of the soil under the foundation of the house "would not have occurred but for the flooding and did in fact occur simultaneously therewith." 753 F.2d at 1014. That conclusion is appropriate in this case.

Therefore, I would reverse the decision of the district court and remand it for a determination of the damages, including prejudgment interest at the rate allowed under Illinois law.

A true Copy:

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APPENDIX B

-A-18-

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF ILLINOIS

JOSEPH SODOWSKI,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Case No. 84-1350
	)	
NATIONAL FLOOD INSURANCE PROGRAM OF THE FEDERAL EMERGENCY MANAGEMENT ACT,	)	
	)	
Defendant.	)	

O R D E R

The Plaintiff, Joseph Sodowski, filed this complaint against National Flood Insurance Program to recover for damage to his house under the policy of flood insurance issued pursuant to the National Flood Insurance Act of 1968, 42 U.S.C. §§4001 to 4127. The Court held a bench trial on this matter and also visited the Plaintiff's house to examine the damage to the structure.

This case requires the Court to determine what caused the damage to Mr. Sodowski's house. Once the Court has made that determination, it must then look to the wording of the flood insurance contract between the Plaintiff and the Defendant to determine if the specific cause of the damage is included or excluded from the terms of the policy. The first of these issues is a mixed question of law and fact because the Court must piece together the events which occurred and come to a conclusion about the proximate cause of the damage to the house. The second issue is a question of law, because it requires the Court to apply the actual contract terms to the conclusion it reached about the cause of the damage. The following are the Court's findings of fact and conclusions of law.

FINDINGS OF FACT

The Plaintiff, Joseph Sodowski, is the owner of a house in Peoria County Immediately adjacent to the west bank of the Illinois River. The Plaintiff purchased the house in the early 1950's at which time the house was already an old house. The exact date the house was constructed is unknown.

In the late 1960's, the Plaintiff enlarged the house by adding an addition to the side of the house away from the river bank and covered the entire structure with aluminum siding. The older portion of the house contains the master bedroom, bathroom, living room, and kitchen. Under the older portion of the house is a basement and crawl space.

In 1982, the Plaintiff was a policyholder of a flood insurance policy

issued by the Defendant National Flood Insurance Program. This flood insurance was issued pursuant to the National Flood Insurance Act of 1968, 42 U.S.C. §§4001 to 4127, and the program is now administered by the Federal Emergency Management Agency (FEMA).

The Defendant's flood insurance policy insured the Plaintiff's property against all "Direct Loss by 'Flood.'" The insurance policy defined the term "flood" as follows:

> "A. A general and temporary condition of partial or complete inundation of normally dry land areas from; (1) the overflow of inland or tidal water; (2) the unusual and rapid accumulation or run off of surface waters from any source; or (3) mud slide (i.e., mud flow), a river or flow of liquid mud proximately caused by flooding as defined in subparagraph A-2 above or by the accumulation of water under the ground.

> B. The collapse or subsidence of land along the shore of a lake or other body of water as a result of erosion or undermining caused by waves or currents of water exceeding the anticipated cyclical levels."

The policy specifically excluded losses caused "by theft or by fire, windstorm, explosion, earthquake, landslide or any other earth movement except such mud slide or erosion as is covered under the peril of flood." (Emphasis added).

In December, 1982, the Illinois River overflowed its banks and waters inundated the basement and crawl space under the Plaintiff's residence and reached the first floor living area. There was a high water level for an extended period of time during which there was some current and water activity against the house. The evidence shows that the flood in

December of 1982 was one of the highest floods in recent times. Following the flood, the Plaintiff filed two proof of loss claims with the National Flood Insurance Program, claiming damage to the contents of his home in the amount of $2,066.15 and structural damage in the amount of $50,060.64. The Defendant paid the Plaintiff's claim for contents damaged, but refused to pay for any structural damage, claiming that the damage was caused by settlement of the structure's footings which would be excluded by the policy. The Plaintiff proceeded to file this lawsuit.

The structural damage claimed by the Plaintiff did not exist prior to the flood of December, 1982. After the December flood, the house had floors which were not level, walls which were cracked, windows and doors which were

not aligned, and the roof line of the house was not level.

The cause of the structural damage to the Plaintiff's house was settlement of the ground beneath the house, caused by a change in the consistency of the soil when the flood waters surrounded the foundation during the December, 1982 flood. The wave action of the flood waters during the December, 1982 flood caused the collapse of a wooden wall (non-weight bearing) around the crawl space and basement of the house. The parties have stipulated that the value of this wall is $3,000.00.

CONCLUSIONS OF LAW

This Court has jurisdiction pursuant to 42 U.S.C. §4072. Although the December, 1982 flood was a cause of the damage claimed by the Plaintiff, the

immediate or proximate cause of the damage was the settlement of the structure because of changes in the soil consistency. The written report of the Plaintiff's expert who had examined the damage to the house indicated that the damage was due to settlement or erosion brought on by the flood waters. The Defendant's expert reported that he did not find any indication of erosion damage, with the possible existence of a sinkhole in the crawl space of the basement. From this evidence, the Court concludes that the damage to the house was caused by settlement, which resulted from a change in the consistency of the soil underneath the house.

The flood insurance policy in effect at the time of the 1982 flood specifically excluded from coverage any loss due to earth movement other than

mud slide or erosion. The settlement which caused the damage to the house is a type of earth movement which is excluded from the coverage of the insurance poilicy.

This decision of the Court finds support in the case of West v. Harris, 573 F.2d 873 (5th Cir. 1978). In West, the Court found that damage caused by settlement of a house following a flood was a risk excluded under the flood policy. The court held that regardless of whether the settlement had been in process over a long period of time or whether it occurred immediately after the flood, the settlement (and subsequent structural damage) was still the result of earth movement, which was a peril excluded under the flood insurance policy. The main factual distinction between the present case and

the West case is that in West, the flood waters never entered the house. Nevertheless, the Court concludes that even though the flood contributed to the settling process, the immediate cause of the structural damage was the settlement of the soil under the house, an earth movement, and not the flood waters themselves. See also, Kolner v. Director, Federal Emergency Management Agency, Docket No. 81-C-4749 (N.D. Ill. 1983).

The Eleventh Circuit reached the opposite result in the case of Quesada v. Driector, Federal Emergency Management Agency, 753 F.2d 1011 (11th Cir. 1985). In Quesada, the Court found that the Plaintiff's home sustained damage due to the settling or compacting of the fill underneath the foundation of the home, which occurred as a result of the

saturation of the fill by water from a tropical storm. As in West, the flood waters never actually entered the interior of the Quesadas' home even though the water rose to within inches of the concrete support slab and completely saturated the fill constituting the home's foundation.

The Quesada Court explained that the West decision was premised on the Fifth Circuit's conclusion that the flood and draining of the canals near the West home accelerated a process that was already taking place, e.g., the shifting or "heaving" of the reclaimed swamp land and clay-humus fill under the Plaintiff's house. 753 F.2d at 1014. The Quesada Court distinguished the West case on the factual grounds that the soil makeup and effect of the immediate draining and drying in West caused a

different type of earth movement. Moreover, the Quesada Court noted that since the decision in West, the flood insurance policy of the FEMA had been expanded to include erosion caused by flooding. In light of this expansion of coverage, the Quesada Court characterized the Government's theory of "earth movement" as a strained theory of proximate cause. The Eleventh Circuit concluded that the flood had caused the compaction which led to the damage, and that such damage was covered under the terms of the flood insurance policy.

The dissenting judge in Quesada, Judge Tjoflat, disagreed with the Court's attempt to distinguish West on the facts of the cases, finding them both to be identical. The dissent emphasized the language in West which pointed out that the flood insurance

policy provided coverage only for earth movements which were in the nature of a mud slide caused or precipitated by accumulation of water on or under the ground. The dissent also highlighted the particular language of West which held that the immediate cause of the damage to the house was settlement, and that the damage was the result of earth movement, "regardless of whether the settlement had been in process over a long period of time or whether it occurred immediately after the flood." According to the dissent, this particular language undermined the majority's effort to distinguish West, because the West court did not find that the damage was caused by some preexisting soil condition.

This Court finds the reasoning in West and the dissenting judge's opinion

in Quesada to be persuasive in applying the terms of the insurance policy to the facts of the present case.

Even though the structural damage to the house was excluded from coverage under the flood insurance policy, the damage to the wooden wall at the base of the house was caused by the action of the flood waters on the wall. Therefore, such damage does come within the terms of the flood insurance policy.

CONCLUSION

Because the Court finds that the structural damage to the house was caused by earth movement, such damage is not covered under the terms of the flood insurance policy issued by the National Flood Insurance Program. However, the Court directs the Clerk to enter judgment in favor of the Plaintiff and

against the Defendant in the amount of $3,000.00 which is the value of the wooden wall which was damaged by the flood waters.

It is so ordered this 11th day of July, 1986.

/s/
Michael M. Mihm
United States District Judge